No. 20192

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JEROME L. DOFF, *et al.*,

Appellants,

vs.

BRUNSWICK CORPORATION,

Appellee.

Appeal From the United States District Court for the Southern District of California Central Division.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANT.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a summary judgment of the United States District Court for the Southern District of California, Central Division, adjudging that appellee have and recover from appellants the sum of $469,665.35, together with interest thereon at the rate of 7% as provided by law and appellee's costs of suit incurred herein; and, further, that appellants take nothing by reason of their counterclaim on file herein and that said counterclaim be dismissed on the merits. Jurisdiction of the District Court was based upon diversity of citizenship and an amount in controversy which exceeds, exclusive of interest and costs, the sum of $10,000.00.

This Court has jurisdiction to entertain this appeal and to review the summary judgment of the District Court under Section 1291 of Title 28, United States Code.

II.
STATEMENT OF FACTS.

This is an action based in contract upon a Purchase Agreement and a Loan Agreement by and between appellee, Brunswick Corporation (Brunswick and Transa Structures, Inc. (Transa), both Delaware corporations, and a Guarantee Agreement executed by appellants for the purpose of guaranteeing loans made to Transa under said Loan Agreement.

Suit was filed herein by Brunswick on December 20, 1963 naming appellants Jerome L. Doff and Mildred C. Doff as defendants therein. The basis of said suit was the alleged failure of Transa to make repayment of loans arranged by Brunswick under said Loan Agreement and the failure of appellants to fulfill their alleged obligations under said Guarantee Agreement. [Transcript of Record, p. 2.]

Answer was filed by appellants on February 25, 1964 [T. R. p. 41] and, upon motion [T. R. p. 106] appellants filed an Amended and Supplemental Answer and Counterclaim on July 21, 1964. [T. R. p. 230.] The basis of said counterclaims was that Brunswick's failure to fulfill its obligations under said Loan Agreement was a breach of said agreement causing the insolvency of Transa and Transa's resulting inability to repay said loans; that said breach obviated appellant's obligations under said Guarantee Agreement; and that Brunswick's failure to purchase appellants' shares of stock in Transa pursuant to the terms and conditions of said Purchase Agreement constituted a breach of said agreement causing damage to appellants in the sum of $1,000,000.00.

Appellee's Motion for Summary Judgment was filed on July 20, 1964. [T. R. p. 109.] Said motion was heard on August 3, 1964 and on August 10, 1964, and summary judgment in favor of appellee, based upon the Court's Findings of Fact and Conclusions of Law [T. R. p. 330], was filed and entered on August 21, 1964. [T. R. p. 336.]

Argument upon the motion for summary judgment was based upon appellee's assertion that there was no genuine issue of fact to be determined by the Court, in that appellee's allegations of default by Transa of the terms and conditions of said Loan Agreement were not controverted by appellants and that said alleged default automatically made appellants liable under said Guarantee Agreement, thereby providing ground for summary relief.

In reply, appellants asserted that said alleged default was, in fact, clearly and sufficiently controverted by appellants, both by the pleadings and by affidavit, and that, therefore, there was a genuine and substantial issue of fact presented with regard to the allegation of default and, further, that there were equally substantial and genuine issues of fact presented by pleading and affidavit with respect to other matters having to do with the entire said transaction between Brunswick and Transa, as said transaction related to appellants. [Supplemental T. R.]

The District Court ruled in favor of appellee's assertions as to lack of controversy on the allegation of default by Transa, dismissed appellant's counterclaim on the basis that said counterclaim was without merit in view of the Court's finding of default, and granted summary judgment in favor of appellee.

This appeal followed. [T. R. p. 359.]

III.
SPECIFICATION OF ERRORS.

A. The District Court erred in granting summary judgment herein in that:

1. A genuine and substantial issue of material fact was raised by appellants' pleadings as to whether or not Transa was in default of its obligations under the Loan Agreement at the time demand was made upon appellee by Transa to perform in accordance with the terms and conditions of said agreement.

2. A genuine and substantial issue of material fact was raised by appellants' affidavit in opposition to motion for summary judgment as to whether or not Transa was in default of its obligations under the Loan Agreement by reason of Transa's alleged failure to make an interest payment pursuant to the terms and conditions of said agreement.

3. A genuine and substantial issue of material fact was raised by appellants' affidavit in opposition to motion for summary judgment as to whether or not Transa was in default of its obligations under the Loan Agreement by reason of Transa's alleged failure to comply with the specific provisions of paragraph 5.2 of said agreement.

IV.
SUMMARY OF ARGUMENT.

Rule 56 of the Federal Rules of Civil Procedure, generally, permits the parties making and opposing a motion for summary judgment to file supporting affidavits, which together with the pleadings, depositions and admissions on file, may be examined by the Court to ascertain whether there is any conflict of factual matters.

Recognizing, however, the serious implications of providing summary relief without a trial on the merits, the courts have consistently held that a summary judgment cannot be granted if there is a conflict of factual matters, and that while affidavits may be submitted and scrutinized by the court to ascertain whether such a conflict of facts exists, such affidavits may not be used to determine the actuality of facts. *Transcontinental Gas Pipe Line Corp. v. Bourough of Milltown,* 93 F. Supp. 283; *Zig Zag Spring Co. v. Comfort Spring Corp.,* 89 F. Supp. 410; *Rosenblum v. Dingfelder,* 111 F. 2d 406; *Lewis v. Atlas Corp.,* 63 F. Supp. 217, aff'd 158 F. 2d 599.

In further recognition of the aforementioned serious implications, the courts have been careful to resolve any doubt as to the existence of a genuine issue as to a material fact against the party moving for summary judgment. *Sarnoff v. Ciaglia,* 165 F. 2d 167; *Silvary Lighting v. Versen,* 10 F.R.D. 507; *First National Bank of*

Jersey City v. Fleming, 10 F.R.D. 159; *Burt v. Bilofsky,* 9 F.R.D. 299; *Robinson v. Waterman S.S. Co.,* 8 F.R.D. 155; *Newark Evening News Pub. Co. v. King Features Syndicate,* 7 F.R.D. 645.

The District Court in rendering summary relief herein relied exclusively upon affidavits submitted by the parties hereto, and failed to consider the pleadings on file. This is clearly contrary to the position consistently adhered to by the courts in holding that well-pleaded facts in the pleadings suffice of themselves, regardless of affidavits, to create a fact issue requiring denial of motion for summary judgment. *United Lacquer Mfg. Co. v. Maas & Waldstein Co.,* 111 F. Supp. 139; *Schenley Distributors v. Arsconsin Wine and Spirit Import Corp.,* 28 F. Supp. 635; 28 U.S.C.A. §§ 1338, 2201, 2202; 35 U.S.C.A. § 1 *et seq.,* 184.

Summary judgment in this matter was entered upon the District Court's findings of fact that Transa was uncontrovertedly in default under the terms and conditions of the Loan Agreement between Transa and appellee and that, therefore, there was no necessity for any further performance on the part of appellee.

Appellants, by way of their pleadings, affirmatively allege that Transa had performed all covenants, promises and conditions required under said Loan Agreement to be performed by Transa. Said allegation is, in and of itself, sufficient to negate and deny that Transa was in default when demand was made upon appellee to

fulfill its obligations under the Loan Agreement. The District Court, however, intent in its search for language of direct denial in appellant's affidavit, wholely failed to consider the obvious denial set forth in the pleadings of appellants.

In addition, the District Court, even in its restricted examination of appellant's affidavit, assiduously and miraculously avoided recognition of obvious statements of fact which could serve only to lead a reasonable mind to conclude that Transa's alleged defaults had, in fact, been denied by appellants and that, therefore, a genuine and substantial issue of fact had been raised.

Appellants assert that the District Court was in gross error in ruling that appellants had not adequately controverted appellee's allegations of default on the part of Transa. Not only are there adequate defenses to and denial of all of the allegations raised in appellee's complaint, but appellants, if permitted a full trial on the merits, feel confident that judgment will issue in their favor for the damages alleged in their counterclaims.

V.

ARGUMENT.

The District Court Erred in Granting Summary Judgment Herein:

A. Appellant's Pleadings Affirmatively Joins the Issue of Fact as to Whether or Not Transa Was in Default at the Time Demand Was Made Upon Appellee to Perform in Accordance With the Terms and Conditions of the Loan Agreement Between Transa and Appellee.

The basic elements of this action are of the utmost simplicity: money was lent which was not repaid and this action is brought for recovery thereof. However, the circumstances surrounding this simple premise of the within action are of the utmost complexity, and while there is no conflict with respect to the basic premise, the record reflects considerable conflict with respect to factual matters.

The volume of the pleadings and supporting affidavits on record in this matter provides ample demonstration of the true complexity of the issues involved, to which the District Court attested in its remark ". . . this is more voluminous than a trial, a motion for summary judgment. I would have been better off to have tried the case, I think . . ." [T. R. p. 34.] Appellant is in complete accord with the Court's observation.

Examination of the Transcript of Proceedings in this matter will show that the District Court based its ruling in favor of summary judgment entirely upon the Court's conclusion that Transa was in fact in default under the Loan Agreement as alleged by appellee. In reaching this conclusion, the Court relied entirely upon its interpretation of the meaning of the affidavits of

the parties, and stated, "I think in view of the default, there is no obligation on the part of Brunswick to supply any more money. And since there is no denial of that in the record I am afraid I will have to grant the motion for summary judgment." [T. R. p. 41.]

Contrary to the contention that the record reflects no denial of appellee's allegation of Transa's default, it will be seen that ample denial of this allegation was presented by appellants, both by way of the pleadings and by way of affidavit. Page 3 of appellants' Amended and Supplemental Answer and Counterclaim contains the following two paragraphs:

"II

On or about March 21, 1962, at Los Angeles, California, plaintiff entered into a written agreement with defendant JEROME L. DOFF and TRANSA STRUCTURES, INC., a corporation, (hereinafter referred to as TRANSA) wherein plaintiff agreed to loan, or cause another lender to loan, to TRANSA up to $600,000. A copy of said agreement is attached hereto marked Exhibit 1, and made a part hereof by reference.

III

TRANSA performed all conditions, covenants and promises under said agreement on their part to be performed."

It is urged by appellants that no other meaning can be derived from the language of the aforequoted two paragraphs other than that Transa had performed all of its obligations under said agreement, that Transa was therefore not in default under said agreement, and

that the absolute effect of the language is a denial of any default whatsoever by Transa under said Loan Agreement.

B. Appellant's Affidavit in Opposition to Motion for Summary Judgment Contains Adequate and Sufficient Denial of Appellee's Allegation That Transa Was in Default Under the Loan Agreement by Reason of Transa's Failure to Make an Interest Payment on May 23, 1962.

Paragraph 10, page 4 of the District Court's Findings of Fact and Conclusions of Law reads as follows:

> "Interest due and payable May 23, 1962, on said loan was not paid and constituted a default by Transa under notes evidencing said loans made to Transa to that date."

This "fact" was specifically controverted in the affidavit of appellant Jerome L. Doff in opposition to motion for summary judgment. On page 1 of said affidavit, lines 28 through 32, and on page 2, line 1, the following is stated:

> "During the month of May 1962, Transa Structures made repeated demands upon Brunswick for the balance of $130,000 *which Brunswick was obligated to loan to Transa under the Loan Agreement;* Transa even went so far as to forward a promissory note for the $130,000 to Brunswick, but Brunswick refused to loan any additional sums to Transa."

On pages 4 and 5 of said affidavit, lines 30 through 32 and 1 through 2, respectively, the following statement is made:

> "I know of my own knowledge that Transa's demand on Brunswick for the balance of $130,000

was made prior to May 23, 1962, which is the date Mr. Niemann contends that Transa became in default on an interest payment and that Brunswick was excused *thereafter* from making any further loans."

How could appellee reasonably assert, and the District Court concur, that appellee had a right to avoid performance under the Loan Agreement On the Basis of a Default Which Had Not Occurred at the Time Brunswick's Performance Was Demanded?

It is submitted that the District Court, anxious in its search for a specific denial of the alleged default in interest payment, overlooked completely the fact that the language of the afore-quoted paragraphs, though couched in positive rather than negative words, is an unmistakable denial of default, inasmuch as no default existed prior to and at the time of the demand for additional funds which appellee was obligated to furnish under the Loan Agreement. Consequently, appellee had no right to avoid performance under said agreement and appellee's allegation that Transa was in default at a later date is specious.

C. Appellant's Affidavit in Opposition to Motion for Summary Judgment Contains Adequate and Sufficient Denial of Appellee's Allegation That Transa Was in Default Under the Loan Agreement by Reason of Transa's Failure to Comply With the Provisions of Paragraph 5.2 of Said Agreement.

Paragraph 9, page 3 of the District Court's Findings of Fact reads as follows:

"On May 15, 1962 the number of said units sold and assigned to Brunswick by Transa under said

California contracts aggregated less than nine units and did not include assignments by Salestran, Inc. of its interests in said California contracts and constituted a default by Transa under said loan agreement."

Paragraph 5.2 of said Loan Agreement reads as follows:

"Transa shall have assigned or caused to be assigned to Brunswick, or to the other lender hereunder, and shall have obtained the consents of all necessary third parties to such assignments, all sums due and to become due to Transa in connection with the Interior Contract and all sums due and to become due to Transa and to Salestran, Incorporated in connection with the California Contracts (which shall include at least thirty (30) units), such assignments and consents to be in a form acceptable to Brunswick's General Counsel, and, where deemed necessary by Brunswick, all filings shall have been duly made and all notices duly given with respect to such assignments; provided, however, that, except as hereinafter provided, all of the foregoing contracts need not be assigned, prior to requesting any loan, if the amount of the requested loan, together with all the outstanding loans hereunder, does not exceed the moneys due and to become due under such of the foregoing contracts as have been assigned as aforesaid, with all necessary consents obtained and filings and notices duly provided for. In any event all of the foregoing contracts shall be assigned to Brunswick or such other lender prior to May 15, 1962, as security for all loans hereunder."

Appellant Jerome L. Doff's affidavit in opposition to motion for summary judgment specifically controverts and denies this alleged default. On page 3, lines 17 through 22 of said affidavit, it is alleged:

> "Also, a further reading of paragraph 5.2 of the Loan Agreement clearly indicates that there is no obligation on Transa to assign all of the contracts to Brunswick prior to May 15, 1962, if the total amount of the contracts that had already been assigned exceeded the amount of the loans."

At another point in said affidavit, it was stated:

> "Mr. Nieman's interpretation of paragraph 5.2 of the Loan Agreement as set forth on page 4, line 3, of his affidavit is incorrect. That section only provides that all of the Transa contracts need not be assigned to Brunswick if, in fact, the contracts that had already been assigned exceed the amount of monies loaned. His further contention that Brunswick had an excuse for not loaning the full $600,000.00 by reason of certain offsets claimed by Salestran is not meritorious for the reason that there is nothing in the loan agreement that reduces Brunswick's obligation to loan by any claim or offsets that Salestran or anyone else might have against Transa."

The aforequoted paragraphs are demonstrative of appellants' assertion that the District Court failed to recognize the exception contained in said paragraph 5.2 which made it unnecessary to assign any specific number of units or sums due under the California and Interior contracts if the value of the units and sums due under said contracts already assigned was of a value in

excess of the amount of the requested loan. Consequently while it may have been correct to allege that a numbr of units less than thirty had been assigned and that the interest in the California contracts had not been assigned, it was totally incorrect to conclude that a default had occurred without determining if the value of the units and contracts already assigned had a value in excess of the amount of the loan requested.

As stated *supra* herein, Transa made repeated demands upon appellee for the balance of $130,000.00 which appellee was obligated to loan under said Loan Agreement. These demands were made during the month of May, 1962. At no point in the record does appellee deny that these demands were made and refused, or that said demands were not made prior to May 15, 1962. Implicit in the words "Brunswick was obligated" is a denial of any default on the part of Transa, whether such default might relate to the provisions of said paragraph 5.2 or any other default which might be alleged.

Examination of the Transcript of Proceedings, pages 38 and 39, lines 25, and 1 and 2, respectively, show complete reliance by appellee on the allegations set forth in paragraph 7(a) of William L. Niemann's Affidavit in Support of Summary Judgment, dated July 27, 1964. Said paragraph 7(a) states that:

> "Section 5.2 of said loan agreement required the proceeds of the sale of at least thirty units of the California Contracts to be assigned to the lender prior to May 15, 1962, but the number sold and assigned prior to May 15 aggregated less than nine units and did not include assignments by Salestran, Incorporated, of its interest in the contracts as required by said section."

As is apparent from the foregoing, appellee merely alleged that the first portion of said section 5.2 had not been complied with, but failed to allege that the qualifying exceptions contained in said paragraph had not been complied with. The afore-quoted portions of appellant, Jerome L. Doff's affidavit clearly allege that the said paragraph 5.2 must be considered in its entirety and, when so considered, the allegations of Niemann are "incorrect" and "not meritorious," as alleged in the aforesaid appellant's affidavit.

In brief, it was possible for appellant to specifically deny that portion of the said paragraph relied upon by appellee, but it was not necessary to so do as the balance of the paragraph not mentioned by appellee qualified the portion alleged. As a consequence, the District Court could presume that it was deemed admitted by appellee that the value of the units and contracts assigned exceeded the value of the amount of loan requested.

Finally, Jerome L. Doff's aforesaid affidavit states unequivocably that:

> "It was my understanding that all of the contracts which were to be assigned to Brunswick under the Loan Agreement had either been assigned to Brunswick or were held by Brunswick in a condition for assignment and recording. . . ." [p. 3, lines 13-16 of said affidavit.]

Appellant asserts that the above quoted language is a specific denial of appellee's allegations of default by Transa under said paragraph 5.2 of said Loan Agreement. The District Court was not receptive to this assertion as demonstrated by the following exchange between counsel for appellant and the Court [T. R. p. 35, lines 21-25; p. 36, lines 1-6]:

"The Court: Well, let's take the one that is more direct, there is one of the two that is more direct. The first one is that the 30 units to be assigned had not been, and there were less than nine. How about that?

Mr. Lane: All right. Mr. Doff's affidavit, he says, your honor, that as far as he knew they were assigned. That was his understanding—

The Court: Well, that is not a denial, counsel, that doesn't meet the issue.

You know in a motion for summary judgment the rule requires that you must make a positive, specific statement."

While the Court did not appear to think that the words "It was my understanding," as stated by Jerome L. Doff in his affidavit and quoted above, were sufficient to afford evidence of a positive and specific state of mind, it will be noted in the following exchange between the Court and counsel for the appellee, which took place immediately prior to the above quoted exchange, that the Court, itself, used the word "understanding" as an indication of a positive and specific state of mind:

"The Court: In your affidavit do you allege anywhere that this is the reason you did not make the additional loan?

Mr. Workman: That is correct, your Honor.

The Court: It is my understanding that you have. I have read them all over. . . ."

Appellant urges that the foregoing statement by appellant Doff that his understanding was that all the requirements of paragraph 5.2 had been satisfied constitutes a specific denial which, in addition to the other denials asserted above, gives rise to a genuine and substantial issue of fact requiring a trial on the merits.

VI.
CONCLUSION.

For the reasons stated, it is respectfully submitted that the District Court's order granting summary judgment in favor of appellee be reversed, and the cause remanded with instructions that the action be tried on the merits.

Jerome L. Doff,
In Propria Persona for Appellants.

Certificate.

I certify, that in connection with the preparation of this Amicus Curiae Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

JEROME L. DOFF